TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 148

UNITED STATES BEDDING COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED OCTOBER 6, 1924

(30,199)

(29,796)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 486

UNITED STATES BEDDING COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1923

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. B-435

UNITED STATES BEDDING CO., a Corporation,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On December 14, 1922, the plaintiff filed its original petition.

On January 3, 1923, the defendant filed a general demurrer to said petition.

On February 5, 1923, the demurrer was submitted without argument.

On February 19, 1923, the court filed an order sustaining said demurrer and dismissing the plaintiff's petition.

On March 7, 1923, the plaintiff filed a motion for a new trial and asked leave to file an amended petition.

On March 12, 1923, the court filed an order allowing amended petition to be filed.

On March 12, 1923, the plaintiff filed its amended petition. Said amended petition is as follows:

[fol. 2] II. AMENDED PETITION—Filed March 12, 1923

The claimant, United States Bedding Company, respectfully represents:

1. That it is a corporation duly created and existing under the laws of the State of Minnesota engaged in the manufacturing of mattresses and in buying and disposing of cotton linters.

[fol. 3] 2. That on May 27, 1918, claimant had on hand 700 bales of cotton linters, 373,612 pounds, and on that day the United States through the War Industries Board issued a compulsory order requisitioning all existing stock of linters, stating "Therefore it becomes imperative that all existing stocks and all future production of linters be requisitioned for explosive purposes," and claimant and all others were forbidden to sell to any one but the Government.

2A. That the said compulsory order is filed herewith as Exhibit "A" dated May 27, 1918; that the questionnaire attached thereto was fully answered by the claimant setting out the amount of linters the claimant had on hand; that on July 10, 1918, the Government issued another regulation which is filed herewith as Exhibit "B" under which the Government inspected the said linters of the plaintiff and offered to buy them but the plaintiff refused to accept the price fixed thereby and the Government officers thereupon forbid the plaintiff to dispose of or use the said linters but to hold the same

and the Ordnance Department then began exercising the right to commandeer by which the owner was to be given an opportunity to establish the actual value of the linters but before this commandeering procees was completed the Armistice was signed and the Government did not then take the linters.

3. That the United States had duly authorized and appointed Du Pont American Industries, Inc., as agent to take in and issue orders for all linters so requisitioned and said Du Pont American Industries, Inc., as such agent for the United States requisitioned 700 bales of linters from the claimant and inspected and classified [fol. 4] same as Class "C" and directed the same to be consigned to the U. S. A. War Department, for which the Government under the compulsory order fixed the price at $5.50 per hundredweight f. o. b. point of production as fixed and required by the said compulsory order of May 27, 1918, only allowing the claimant $20,548.60 for the linters.

4. That the claimant refused the price so fixed which was far less than the cost of the linters as by said compulsory order it was required to deliver the linters or hold same to be commandeered and it would have to take its chances of being reimbursed for its loss under the Act of March 2, 1919, entitled "An Act to provide relief in the cases of contracts connected with the prosecution of the War and for other purposes" for a fair and equitable settlement and accordingly refused to ship or deliver the said linters and held same to be commandeered. The said 700 bales of cotton linters had cost the claimant $32,392.78, without any profit on the linters so withdrawn from sale by the United States; that the withdrawal from sale of the said linters by the United States under the said compulsory order, requisitioned and commandeering process above was a taking of same by the Government without agreement and without the consent of claimant and over its protest.

5. That but for said orders and regulations of the United States, claimant could and would, have sold said linters to private parties for $32,392.78 or more in July or August, 1918; that on November, 1918, the United States issued an order or regulation releasing all linters held under the said prior orders and regulations, thus flood-[fol. 5] ing the market so that claimant could not sell said linters at 5½c per lb. or any other price; that plaintiff is entitled to recover said $11,744.18 with interest from November, 1918.

6. That the claimant is sole owner of the claim set forth in this petition, no assignment or transfer of the same of any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on account of the violation of the said agreement the sum of $11,744.18 after allowing all credits and set-offs. The claimant has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

32.392.78

Wherefore, Claimant prays judgment against the United States of America in the sum of $11,744.18 and for such other and further relief as this Honorable Court may grant both at law and in equity, in the premises.

United States Bedding Company, By Raymond M. Hudson.

Affidavit of Raymond M. Hudson to above paper omitted in printing.

[fol. 6] EXHIBIT "A" TO AMENDED PETITION

(Copy)

War Industries Board

B. M. Baruch, Chairman

In your reply refer to —.

Washington, May 27, 1918

To dealers in and users of cotton linters:

For your information and guidance you are advised, on May 2, the price-fixing committee of the War Industries Board fixed a base price of $4.67 per cwt. f. o. b. points of production for all linters then on hand and to be produced until August 1, 1919. This action was made necessary by the increasing requirements due to war conditions. While no shortage of linters exists at the present moment, the operation of the new Government powder plants now nearing completion will about double the linter requirements; therefore, it becomes imperative that all existing stocks and all future production of linters be requisitioned for explosive purposes.

[fol. 7] The armies and navies of the United States and the Allies must be furnished an ample supply of ammunition, and any diversion of linters, irrespective of grade, to other channels would handicap the Government to just that extent.

All linters that have not voluntarily been tendered the Government at the price fixed for munition linters will be commandeered as the actual needs develop, and the commandeering process itself will give ample opportunity for the owners of special high-grade linters cut for mattresses and other industries to establish the value of their product in each individual case.

It is the purpose of this section to help out the mattress and other manufacturers using cotton linters in rounding out their business and completing existing contracts for finished products, but each case will necessarily have to be handled separately and adjusted on its merits.

We inclose herewith a questionnaire which we will ask that you fill out and return to George R. James, cotton and cotton products

section, War Industries Board, Room 917, Council of National Defense, Washington, D. C., at the earliest possible moment.

Yours very truly, Geo. R. James, Chief Cotton and Cotton Products Section.

EXHIBIT "B" TO AMENDED PETITION

(Copy)

War Industries Board

[fol. 8] B. M. Baruch, Chairman

In your reply refer to mattress linter.

Washington, July 10, 1918.

To manufacturers of, dealers in, and users of cotton linters:

It having been deemed necessary for the Government to take over all the cotton linters now in existence, irrespective of grade or ownership, arrangements have now been made for the purchase of mattress or high grade linters which were produced prior to May 2nd, 1918, at the actual value of the commodity.

Through the cooperation of the U. S. Bureau of Markets and cotton and cotton products sections of the War Industries Board, three samples of linters have been selected representing types of linters on which prices have been suggested which are considered fair and equitable, both to owners of the linters and the Government.

The Du Pont American Industries Co., of Wilmington, Del., as the purchasing agency for the Ordnance Department is authorized to buy the linters as follows: A type of linters designated as "A" grade, suggested price 10c per pound. A type of linters designated as "B" grade, suggested price 7c per pound. A type of linters designated as "C" grade, suggested price 5½c per pound. All prices to be f. o. b. points of location. It is suggested that by agreement between the inspector acting for the purchasing agency of the Ordnance Department and the owners of the linters purchase can be made on the basis above suggested, but it must be understood that [fol. 9] the prices named are not obligatory or by authority of the War Industries Board, but are, in the opinion of the representatives of the U. S. Bureau of Markets and the cotton and cotton products section of the War Industries Board, acting as a committee, fair and just prices that should be paid for these three selected grades.

In the event agreement cannot be reached between the inspector and the owner, then the Ordnance Department may exercise its right to commandeer, which process gives the owners opportunity to establish the actual value of their commodity in each instance. All linters below the grade represented by type "C" shall be considered munition linters, and the price of $4.76 per hundred pounds f. o. b. points of production established as of May 2nd, 1918, by the price-fixing com-

mittee of the War Industries Board shall apply. There shall be only one grade (munition type) of linters manufactured during the 1918-19 season, and all purchases will be made by the Procurement Division of the U. S. Ordnance Department.

Yours very truly, (Signed) Geo. R. James, War Industries Board, Chief Cotton and Cotton Products Section.

[fol. 10] III. General Demurrer to Amended Petition—Filed March 27, 1923

Defendant demurs to the amended petition in this case for the reason that the facts set forth therein do not furnish any grounds for relief.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Special Assistant to the Attorney General.

IV. Submission of Case on Demurrer

On April 23, 1923, the general demurrer to plaintiff's amended petition was submitted without argument by Mr. W. F. Norris, for the defendant, and by Mr. Raymond M. Hudson, for the plaintiff.

[fol. 11] V. Order Dismissing Petition—Entered Apr. 30, 1923

This cause coming on to be heard was submitted upon the demurrer to the amended petition. On consideration whereof, the court is of opinion that the demurrer is well taken. It is therefore adjudged and ordered by the court that the defendant's demurrer to the amended petition be, and the same is hereby, sustained and the petition is dismissed.

Memorandum

(1) The averments do not show a contract, express or implied, whereby the Government agreed to pay for the linters.

(2) There was no taking or appropriation by the Government of the plaintiff's linters.

(3) The plaintiff refused the Government's price for its linters and "held same to be commandeered," and this course was not adopted by the Government.

(4) The order "releasing all linters" gives no right of action.

[fol. 12] VI. Proceedings After Entry of Judgment

On June 8, 1923, the plaintiff filed a motion for a new trial. On July 2, 1923, the court overruled said motion.

VII. Plaintiff's Application for Appeal—Filed July 5, 1923

Now comes the plaintiff and moves the court to allow it an appeal to the Supreme Court of the United States from a judgment of the Court in and on April 30, 1923, to which a new trial was denied July 2, 1923.

Raymond M. Hudson, Attorney for Plaintiff.

VIII. Order of Court Allowing Appeal—Entered July 9, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 13] Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of case on demurrer to the amended petition; of the order of the court dismissing the amended petition with memorandum; of the plaintiff's application for appeal to the Supreme Court of the United States; of the order of the Court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twelfth day of July, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 29,796. Court of Claims. Term No. 486. United States Bedding Company, appellant, vs. The United States. Filed August 6th, 1923. File No. 29,796.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 486

UNITED STATES BEDDING COMPANY
Appellant

vs.

THE UNITED STATES
Appellee

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appellant owned seven hundred bales of cotton linters May 27, 1918, when the defendant through the War Industries Board issued a regulation, being a compul-

sory order requisitioning all existing stocks of cotton linters and forbade the appellant and others to sell any cotton linters to anyone but the Government (p. 3) and on July 10, 1918, issued another regulation fixing a price and grade for the linters but not making same obligatory and the two regulations provided that if the appellant would not accept the price fixed by the Government, the Government would take the linters at the "actual value of the commodity" and the appellant should be given an opportunity to establish the value.

It is alleged that from May 27, 1918, to November 19, 1918, because of the regulations appellant could not sell its linters to anyone except the Government (p. 2, par. 5), and during that period or rather when all the linters were released in November, the market price had greatly decreased from what it was in May and July.

In July the defendants, through the Dupont American Industries, Inc., its duly authorized agent, issued a requisition to the appellant for the said seven hundred bales of cotton linters, offering therefor $20,548.60, but the appellant refused to accept this and demanded $32,392.78, which was the minimum market value of the linters, appellant then being able to sell the same for that amount or more; thereupon the defendant began a commandeering process under the regulations to fix the value, but before completing this process the defendant released the linters and the appellant was not able to get more out of them than $20,548.60 because of the fall in the market price and the appellant suffered a loss of the difference between that amount and $32,392.78, the minimum market value when taken, namely, $11,744.18, the amount of the claim

in suit with interest from November 19, 1918. The appellant alleges that the Government having prevented it from selling its linters, having requisitioned and having taken same for its own use and benefit in the war emergency and held same from May 27 to November 19, 1918, is liable to the appellant for the damages for being deprived of its property during this period and being prevented from selling same at the highest market value in May and July.

ASSIGNMENT OF ERRORS.

The Court erred in holding:

1. The averments do not show a contract express or implied, whereby the Government agreed to pay for the linters.
2. There was no taking or appropriation by the Government of the plaintiff's linters.
3. The plaintiff refused the Government's price for its linters and "held same to be commandeered," and this course was not adopted by the Government.
4. The order "releasing all linters" gives no right of action.
5. The demurrer should be sustained.

THE ARGUMENT

1. The exhibits, "A" and "B," show clearly an implied agreement of the Government to buy at a fixed price or if the appellant would not accept that price, the Government would "take" linters and the price be determined.

This is not only an agreement of the Government to

buy, but also an agreement by regulation and the appellant was entitled to recover under the regulation as on a contract (Maddox vs. U. S. 20 C. Cl. 192; Gulf Transit Co. vs. U. S. 43 Ct. Cls. 183).

Furthermore, the Government issued a specific requisition (p. 2, par. 3), which is a compulsory or obligatory contract. Roxford Knitting Company vs. Moore, 265 Fed. 177 (certiorari denied 40 Sup. Ct. 588); U. S. vs. Russell, 13 Wall. 623, where it was held that the temporary taking of personal property makes the Government liable for the damage during the time the property was held by the Government and used to its benefit.

2, 3, 4 and 5. The regulations, Exhibits "A" and "B" and the requisition under paragraph 3, page 2, are clearly a "taking" of the property of the appellant for which the Government is liable, which liability is measured by the damage to the appellant, being the difference between the market value when taken in May and July and what the appellant could and did get out of them after they had been released by the Government in November, 1918. (All italics hereafter are mine.)

The allegations (par. 5, p. 2) show clearly that the market value of the linters was far in excess of the amount claimed, plus what the Government offered, as there was a big demand for linters, but the Government refused to allow anyone to sell except to the Government.

The Government having requisitioned and taken the appellant's linters under the regulations providing for a commandeering process, where they could not agree on the price, which provided an opportunity to the claimant to establish the actual value of the commodity,

the appellant is entitled to the market value of the linters at the time they were taken. In Vogelstein vs. U. S. 43 Sup. Ct. at 565, a case on mandatory orders, the Court said:

> "The market value of the copper taken at the time it was taken measures the owner's compensation. Seaboard Air Line Railway Co. vs. United States, 260 U. S. ....., 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923; United States vs. Chandler-Dunbar Co., 229 U. S. 53, 80, 81; 33 Sup. Ct. 667; 57 L Ed. 1063; Boom Co. vs. Patterson, 98 U. S. 403, 407; 25 L. Ed. 206; U. S. vs. New River Colleries Co. (C. C. A.) 276 Fed. 690, affirmed this day 260 U. S. —, 43 Sup. Ct. 565, 67 L. Ed." —.

In the New River Colleries case (above) the Court said, at p. 557:

> "Nor was it an error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking."

> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by

> the evidence that every day representatives of foreign firms were purchasing or trying to purchase export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *These facts indicate a free market. The owner had a right to sell in that market and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.*"

In U. S. vs. Rogers et al., 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, Mr. Justice Day said:

> "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners *were deprived* of their property," citing Monongehela Navigation Co. vs. U. S. 147, U. S. 341, 13 Sup. Ct. 622, 37 L. Ed. 463.

Appellant could have sold its linters in July and August (par. 5, p. 2) for more than $32,392.78 had not they been requisitioned by appellee, therefore it is entitled to recover on the basis of the market price.

The Court of Claims itself in Peabody vs. United States, 43 Ct. Cl. 5, at page 16, has said:

> "Property has been well defined to be a person's right to possess, *use, enjoy* and *dispose* of a thing not inconsistent with the law of the land." (Citing 1 Lewis Eminent Domain, Sec. 54-58.)

We find in 1 Nichols (2nd Ed.) Eminent Domain,

336: "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of *right* or *interest capable,* of *being enjoyed* as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and *intangible,* incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as chosen in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority (the power of eminent domain) as fully as land or other tangible property." This is nearly an exact quotation from Justice Lurton in Cincinnati vs. Louisville & Nashville Ry. Co., 223 U. S. 390 at 400; 32 Sup. Ct. 267.

The Government regulation prohibiting private parties as alleged from selling linters to anyone but the Government was a *"taking" of the linters* of the plaintiff, and it was in violation of his constitutional right, for when defining constitutional liberty, this Court said in Myer vs. Nebraska, 43 Sup. Ct., at 626:

> "While this court has not attempted to define with exactness the *liberty* thus granted, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the *right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children,

to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

And again at 627:

"The established doctrine is that *this liberty* may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislative power is not final or conclusive but is subject to supervision by the Courts. Lawton vs. Steele, 152 U. S. 133, 137; 14 Sup. Ct. 499; 38 L. Ed. 385."

In Terrace vs. Thompson, 44 Sup. Ct. 17, 18, 262 U. S. —, Mr. Justice Butler said:

"The Terraces' property rights in the land include the right to *use, lease* and *dispose of it for lawful purposes* (Buchanan vs. Warley, 245 U. S. 60, 74; 38 Sup. Ct. 16; 62 L. Ed. 149, L. R. A. 1918C, 210 Ann. Cas. 1918A, 1201) and the Constitution protects these essential attributes of property (Holden vs. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780) and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truas vs. Raich supra; Meyer vs. State of Nebraska, 261 U. S. —, 43 Sup. Ct. 625, 67 L. Ed. —). If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Four-

> teenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer and the threat to enforce it *constitutes a continuing unlawful restriction upon and infringement of the rights of appellants.* . . ."

The requisitioning of the linters under these orders as alleged (par. 3, p. 2) was a "taking" of property in violation of the Constitution for which the Government is liable. Tempel vs. U. S. 39 Sup. Ct. 56 at 59 and cases cited therein, U. S. vs. Gr. Falls Co. 112 U. S. 654, 5 Sup. Ct. 306; U. S. vs. Lynah 188 U. S. 445; 23 Sup. Ct. 349.

In Roxford Knitting Company vs. Moore, 265 Fed. 177 (Certiorari denied, 40 Sup. Ct. 588) the Court held that "orders" for supplies under the President's proclamation, made such "orders" *obligatory* on any person to whom such "orders" were given, and the Court stated at p. 192:

> "The majority of the Court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded of it, that it had *no right to refuse to comply,* and that with this understanding, the supplies were furnished. That being so, effect should be given to the intent of Congress that *civil contracts* should be *postponed* to *orders compulsorily placed.*"

This case was approved and distinguished by this

Court in a note to Price and Co. vs. U. S., 43 Sup. Ct. 299, at 301, as was the case of United States vs. Russell, 13 Wall. 623.

> "A *requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescence* on the part of a *loyal citizen* to the *taking* of his property by the sovereign is *not* the *equivalent* of the *making* of a *contract,* or the entering into of an agreement in the legal sense of that term, for the obtaining of the property in question. *A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest is entered or not, the obligation to repay the owner is the same.*" Benedict vs. U. S., 271 Fed. at p. 719.
>
> "An importer had put into his invoice the price actually paid for goods, with charges, and proposed to enter them at the values thus fixed. The colector concluded that the value would be ascertained as of the time of shipment in New York which was considerably higher. The importer protested but in order to avoid the penalty which was threatened, he did make an addition to his invoice so as to escape that penalty. In an action to recover back the excess duties, the court held: 'This addition and its consequent payment of the higher duties were *so far from voluntary* in him that he accompanied them with remonstrances against thus being coerced to do the act in order to escape a greater evil and accompanied the payment with a protest against the legality of the course pur-

sued towards him.' Now it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be done by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment." Maxwell vs. Griswold, 10 Howard, 243.

"Where the United States instituted an action for the recovery of money on a bond given with sureties, by a purser of the Navy and the defendants, in substance, pleaded that the bond was variant from that prescribed by law, and was under color of office, extorted from the obligor contrary to the statute, by the then Secretary of the Navy, as the condition of the purser's remaining in office and receiving its emoluments, and the United States demurred to this plea, it was held that the plea constituted a good bar to the action." U. S. vs. Tingey, 5 Peters, 115.

"Where the Internal Revenue Bureau requires a commission (on the sale of stamps) to be received in stamps instead of money and refused to modify its decision, receipts and settlements made in pursuance of that requirement and necessity were not voluntary in such sense as to preclude the claimant from subsequently insisting on his statutory rights and recovering such commissions. . . ."

"The *parties* were *not* on *equal terms*, The *appellant had no choice.* The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required." Swift vs. U. S., 111 U. S. 22.

"The payment of money to an official to avoid an onerous penalty, though the imposition of that penalty might have been illegal was sufficient to make the payment an involuntary one. . . . When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. When the duress has been exerted by one clothed with official authority or exercising a public employment, less evidence of compulsion or pressure is required." Robertson vs. Frank, 132 U. S., 17.

As said by Mr. *Justice Holmes* in Portsmouth Harbor Land & Hotel Co. vs. United States, 43 Sup. Ct. 135; 262 U. S. —; "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied whether it was thought of or not."

Clearly there was a taking under the Constitution and a holding by the Government for its own use and benefit of the appellant's personal property whereby appellant was damaged and the demurrer should have been overruled and it should now be overrruled and this appeal reversed and remanded.

Respectfully submitted,

RAYMOND M. HUDSON,
Attorney for Appellant,
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES BEDDING COMPANY, appellant
v.
THE UNITED STATES
No. 143

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE.

This is an appeal by the United States Bedding Company from a judgment of the Court of Claims, sustaining a demurrer to the amended petition of claimant which questioned the sufficiency of the facts averred therein to constitute a cause of action.

The amended petition alleges in substance as follows:

That on May 27, 1918, claimant was the owner of 700 bales of cotton linters (373,612 pounds). On that date the War Industries Board issued a compulsory order (Exhibit A, Rec. 3) requisitioning all existing stocks of linters, and that claimant and all others were forbidden to sell to any one but the Government.

That on July 10, 1918, the War Industries Board issued another regulation authorizing the Du Pont American Industries, Incorporated, to issue orders for all linters requisitioned. Pursuant thereto, the Du Pont Company, at prices fixed by the Government, requisitioned (also referred to as an offer to purchase), inspected, and classified the cotton in issue, directing that it be consigned to the War Department. Claimant refused to accept the prices fixed in the order of the Du Pont Company, or to sell, ship, or deliver the linters to the Government, and held the cotton to be commandeered by the Ordnance Department.

Claimant further alleges that upon the refusal to sell the cotton, the Government officers forbade the claimant to dispose of or use the linters, but instructed claimant to hold them until commandeered. Claimant also alleges, "the Ordnance Department then began exercising the right to commandeer by which the owner was to be given an opportunity to establish the actual value of the linters, but before this commandeering process was completed the Armistice was signed and the Government did not take the linters."

It is further alleged that the purchasing order of the Du Pont Company in specifying the right to hold this stock of linters until commandeered constituted a withdrawal from sale of the same by the United States and was a taking by the Government without agreement or consent of the claimant and over its protest; by reason whereof the claimant

was prevented from selling the linters to others at a more profitable price than that offered by the United States.

In November, 1918, a further order or regulation was issued releasing all linters held under such prior orders or regulations, thereby flooding the market, so that the claimant suffered a loss of $11,744.18 in the sale of its stock of linters, being the difference between what it could and would have sold the linters for had it not held them to be commandeered, and what they sold for thereafter. (Rec. 1, 2.)

A general demurrer to the amended petition of claimant, filed by the United States upon the ground that the facts set forth therein did not constitute a cause of action, was sustained upon the following grounds, the court entering an order dismissing the petition (Rec. 5, 6):

> (1) The averments do not show a contract, express or implied, whereby the Government agreed to pay for the linters.
>
> (2) There was no taking or appropriation by the Government of the plaintiff's linters.
>
> (3) The plaintiff refused the Government's price for its linters and "held same to be commandeered," and this course was not adopted by the Government.
>
> (4) The order "releasing all linters" gives no right of action.

The sole question involved is whether the United States, expressly or impliedly, agreed to take the cotton linters involved.

The claimant contends: First, that the rules and regulations of the War Industries Board constitute an implied agreement by the United States to purchase or requisition the linters. Secondly, that the regulation of the commodity by the Government constituted a "taking" of private property without just compensation.

The Government contends: First, that the cotton linters were never requisitioned by either the Du Pont American Industries, Incorporated, or by the Ordnance Department. Second, that no contract to purchase can be implied from the regulations involved. Third, that the control exercised by the United States over this commodity did not constitute a "taking" of claimant's property without just compensation.

ARGUMENT

I

The United States did not requisition or commandeer the cotton linters in issue; nor did it agree, either expressly or impliedly, to purchase them

From the report of the War Industries Board to President Wilson, entitled "American Industry in the War," pp. 172–174, the following appears:

On April 4, 1918, the War Industries Board organized what was known as the Cotton Linters Section of the Board, with George R. James, Chief, for the purpose of assuming control, as a war measure, of the manufacture and sale of cotton linters, one of the ingredients used in manufacturing explosives.

The mattress manufacturers used a great deal of this commodity, as did also the bedding manufacturers.

Immediately upon the organization of this branch of the War Industries Board, a nation-wide inventory of cotton linters on hand was taken by the use of a series of questionnaires sent to the manufacturers and dealers thereof.

As to the bedding and mattress industries the control thereof was limited to a denial of the use of cotton linters produced after May 2, 1918, except for the manufacture of explosives. This same control applied to all other industries not engaged in making explosives. The use of cotton linters could only be used for other purposes by special license or permit of the War Industries Board.

Following the questionnaires, the War Industries Board issued several bulletins, or regulations, giving advice and instructions relative to the sale of linters to the Government or manufacturers of explosives. The claimant relies upon two of these bulletins in support of its claim, both of which it is alleged show clearly an implied agreement of the United States to buy the linters at a fixed price, or if the price named should not be acceptable, the latter would "take" the linters, the price thereafter to be determined.

Nothing could be further from the mark. The first one issued on May 27, 1918, referred to as Exhibit A to the amended petition, in outlining the

purpose of the control of this commodity, and the policy of the government with regard to the purchase thereof, states:

> For your information and guidance you are advised * * *.
>
> All linters that have not voluntarily been tendered the Government at the price fixed for munition linters will be commandeered *as the actual needs develop*, and the commandeering process itself will give ample opportunity for the owners of special high-grade linters cut for mattresses and other industries to establish the value of their product in each individual case.

That regulation simply informed dealers that they could sell voluntarily their stocks of linters to the Government at fixed prices, or in the alternative hold them until the needs therefor required the Government to commandeer them.

The other regulation referred to as Exhibit B to the amended petition gives notice to manufacturers, dealers and users of cotton linters that the DuPont American Industries Company, as purchasing agent for the Ordnance Department, is authorized to buy linters of the grades and at the prices therein designated. In this connection it states:

> It is suggested that by agreement between the inspector acting for the purchasing agency of the Ordnance Department and the owners of the linters purchase can be made on the basis above suggested, but it must be understood that (fol. 9) the prices named are not

> obligatory or by authority of the War Industries Board, but are, in the opinion of the representatives of the U. S. Bureau of Markets and the cotton and cotton products section of the War Industries Board, acting as a committee, fair and just prices that should be paid for these three selected grades.

The regulation then goes on to state with respect to a plan for commandeering the linters:

> In the event agreement cannot be reached between the inspector and the owner, *then the Ordnance Department may exercise its right to commandeer, which process gives the owners opportunity to establish the actual value of their commodity in each instance.* [Italics supplied.]

Under the plan announced, the claimant could either sell to the Government at the prices designated in the regulations or elect to hold its stock of linters until commandeered by the Ordnance Department the latter affording it the opportunity of proving the actual value of the linters.

This is precisely what the claimant did. It alleges that it refused to sell to the DuPont Company at the prices designated in the order and elected to hold its stock until commandeered in order to obtain a better price for the linters.

It is nowhere alleged that the Ordnance Department commandeered the cotton in question. But it is alleged that before the commandeering process was completed the Armistice was signed and the Government did not take the linters. (Rec. 2.)

The claimant was under no obligation to the

Government under the foregoing regulations, or otherwise, to hold its stock until commandeered. It did so of its own volition in the hope that that action would be taken so that the claimant could receive the actual value thereof.

The claimant was not prevented at any time from selling to manufacturers of explosives or by permission of the Government to other industries.

The claimant is seeking to recover for losses sustained by its own voluntary action of holding the linters involved in the hope that they would be commandeered by the Government, and because the latter did not do so, claimant contends it is liable therefor. It is submitted that there is no merit in the claim.

II

The United States is not liable for any losses sustained by reason of its control of this commodity

There is no difference in principle between the case at bar and *Morrisdale Coal Company* v. *United States*, 259 U. S. 188, in which this court through Mr. Justice Holmes, at page 189, said:

> The petition does not allege or mean that the United States took the coal to its own use. The meaning attributed to it by the claimant is merely that the Fuel Administration fixed the price on coal of this quality at $3.304 per gross ton, and issued orders from time to time directing coal to such employments as best would promote the prosecution of the war * * *.

Continuing, the Court, after referring to the contention of the complainant that the regulations constitute an implied contract to reimburse it for any loss by reason thereof, at page 190, says:

> We see no ground for the claim. The claimant in consequence of the regulation mentioned sold some of its coal to other parties at a less price than what otherwise it would have got. That is all. It now seeks to hold the Government answerable for making a rule that it saw fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking, and no law-making power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property, to a third person, without adequate compensation, the remedy is, if necessary, to refuse to obey it, not to sue the law maker.

The fact that in the *Morrisdale Coal case* the control consisted of the fixing of prices, whereas here it consists in restricting the sale of a commodity to certain persons, is immaterial. The principles announced in that case are applicable to and control the one at bar. See also *Pine Hill Company* v. *United States*, 259 U. S. 191, in which this court held that losses sustained by reason of price fixing on the part of the Fuel Administrator did not constitute a taking of the claimant's property. See also *Hamilton* v. *Kentucky Distilling Co.*, 251 U. S. 146 (Wartime Prohibition).

CONCLUSION

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1924.

○

UNITED STATES BEDDING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 143. Argued December 11, 1924.—Decided January 5, 1925.

Plaintiff, alleging that it had retained possession of its goods because of a circular of the War Industries Board requisitioning all such goods for the Government, followed by abortive negotiations as to price and by incipient proceedings to "commandeer" which were abandoned because of the Armistice, and that it had sold them thereafter for less than their previous market value, sued in the Court of Claims for the difference. *Held*, that the suit could not be maintained,—

(a) Under the Dent Act, since the agreement, if any, had not been "performed in whole or in part," nor had "expenditures been made or obligations incurred upon the faith of the same," (P. 493,)

(b) Nor as upon an express contract under the Tucker Act, because the transaction was wholly executory and was not "reduced to writing and signed by the contracting parties with their names at the end thereof," as required by Rev. Stats., § 3744, (*Id.*,)

(c) Nor as upon an implied contract under the Tucker Act, because the only authority to requisition the goods was § 10 of the Lever Act, and proceedings under that section are not based on contract and must be brought in the District Court. *Id.*

58 Ct. Clms. 341, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition upon demurrer for failure to state a cause of action.

Mr. Raymond Hudson for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims. The petition was dismissed on demurrer for

failure to state a cause of action. It alleges in substance these facts: Cotton linters are used in the manufacture of mattresses and bedding. They are also used as the base of smokeless powder. The plaintiff had in stock, on May 27, 1918, a lot of cotton linters. On that day, the War Industries Board [1] issued a circular "To dealers in and users of cotton linters" notifying them for their "information and guidance" that, because of the Government's requirements, all linters were requisitioned. On July 10, 1918, it issued a further circular on the subject. Later, the Board had direct dealing with the plaintiff about taking over its linters at their actual value. A price was offered which the plaintiff refused to accept. The "Ordnance Department then began exercising the right to commandeer by which the owner was to be given an opportunity to establish the actual value of the linters but before this commandeering process was completed the Armistice was signed and the Government did not then take the linters." Because of the Government's action, plaintiff had retained the linters. Because of the release by the Government after the Armistice of all linters held under such orders and regulations, the plaintiff's stock became worth less than it had cost the plaintiff and less than its market value had been during the preceding summer. The resulting loss was $11,744.18.

Plaintiff contends that it is entitled to recover the amount of this loss. The suit must have been brought under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, or under the Tucker Act, Judicial Code, § 145, upon the ground that there was either an express executory contract to accept and pay the war value or that what occurred was a legal taking from which an implied agree-

[1] It was created by the Council of National Defense, with the approval of the President, July 28, 1917. See Report of the War Industries Board, March 3, 1921; Act of August 29, 1916, c. 418, § 2, 39 Stat. 619, 649; Act of May 20, 1918, c. 78, 40 Stat. 556.

ment to pay arose, under the doctrine of *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, and later cases. We need not discuss the precise facts alleged in the petition.[2] Whatever interpretation be given to the action of the War Industries Board and the Ordnance Department there set forth, the plaintiff must fail.

Recovery can not be had under the Dent Act, among other reasons, because the agreement, if any, has not been "performed in whole or in part" and no "expenditures have been made or obligations incurred upon the faith of the same. Compare *Price Fire & Water Proofing Co.* v. *United States*, 261 U. S. 179. Nor is recovery possible under the Tucker Act. It cannot be had as upon an express contract, because the transaction comes within Rev. Stats., § 3744; was not "reduced to writing, and signed by the contracting parties with their names at the end thereof;" and was wholly executory. *South Boston Iron Co.* v. *United States*, 118 U. S. 37; *Erie Coal & Coke Corporation* v. *United States*, decided this day, *post*, 518. Compare *United States* v. *Andrews & Co.*, 207 U. S. 229, 243; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159. Recovery cannot be had as upon an implied contract, because the only authority to requisition the linters was that conferred by § 10 of the Lever Act (August 10, 1917, c. 53, 40 Stat. 276, 279); and proceedings under that section are not based on contract. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304. Moreover, they must be brought in the District Court. *United States* v. *Pfitsch*, 256 U. S. 547.

We have no occasion, therefore, to consider whether the United States could ever be liable under the Tucker

[2] These are fully stated and discussed in an able opinion by Mr. Ashby Williams, In re Claims of United States Bedding Co. et al., 4 Decisions of War Department Board of Contract Adjustment, p. 325. (Proceedings under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272.)

Act, as for a taking, for loss suffered through the abandonment of the "commandeering process", where the owner had retained possession of the property and the Government had neither accepted, used, or injured it. Compare *Garrison* v. *City of New York*, 21 Wall. 196; *Bauman* v. *Ross*, 167 U. S. 548, 598–9; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 508–9. Nor need we consider whether it could have been held liable under the Lever Act, if suit had been brought in the District Court.

Affirmed.